

BILL LOCKYER, Attorney General
of the State of California
TIMOTHY R. PATTERSON
Supervising Deputy Attorney General
EDWARD H. OCHOA, State Bar No. 144842
Deputy Attorney General
California Department of Justice
110 West "A" Street, Suite 1100
San Diego, CA 92101

P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2041
Facsimile: (619) 645-2012

Attorneys for California Department of
Toxic Substances Control

BEFORE THE
STATE OF CALIFORNIA
ENVIRONMENTAL PROTECTION AGENCY
DEPARTMENT OF TOXIC SUBSTANCES CONTROL

In the Matter of: THE DUNE COMPANY and J.R. SIMPLOT COMPANY <div>Respondents.</div>	Case No. HWCA No. 2002-0050 STIPULATION AND CONSENT ORDER Health & Safety Code Section 25187
---	---

The California Department of Toxic Substances Control ("Department") and
Respondents **The Dune Company** ("Dune") and **J.R. Simplot Company** ("Simplot")
(collectively referred to as the "parties") enter into this Stipulation and Consent Order
(Consent Order) and hereby agree as follows:

1. The parties wish to avoid the expense of litigation and to ensure prompt resolution
of this matter as further described below.
2. Jurisdiction exists pursuant to Health and Safety Code section 25187.
3. Respondent Dune and Respondent Simplot (collectively referred to as
"Respondents") have had the opportunity to and have in fact reviewed the nature of the alleged
violations and the terms and conditions set forth herein with their respective attorneys and enter

into this stipulation with the advice of their attorneys.

4. Respondents waive any right to a hearing in this matter.

5. This Stipulation and Consent Order shall constitute full settlement of the violations alleged herein against Respondents, but does not limit the Department from taking appropriate enforcement action concerning other violations, including those alleged violations identified in section 9, below.

6. On or about March 6, 2002, and April 26, 2002, the Department conducted an inspection and follow-up inspection of Respondent Dune's facility located at 2375 Clark Road, El Centro, California (hereinafter referred to as "the Site"). Respondent Simplot is the owner of the property where the Site is located.

7. The Department alleges the following violations:

(a) **Disposal of a Hazardous Waste at an Unauthorized Locations**

Respondent Dune violated Health and Safety Code section 25201(a), in that on or about March 6, 2002, Respondent Dune:

- (i) Discharged "super concentrated phosphoric acid" to the ground along the railroad tracks, adjacent to the T-reactor area. The super phosphoric acid had been left on the ground for the past 30-days, according to Respondent Dune's officials. The Department observed the same spills 30-days after the March 6, 2002, inspection during a follow-up inspection on April 26, 2002.
- (ii) Discharged to the ground fertilizer having a pH of less than 2 in and around the "acid load-out rack." The discharge affected soils underneath the piping used for loading, soils adjacent to the sump, and soils beneath the asphalt.

(b) **Disposal of a Hazardous Waste at an Unauthorized Location**

Respondent Dune and Respondent Simplot violated Health and Safety Code section 25201, in that at some time prior to March 6, 2002, Respondents Dune and Simplot did dispose of, or caused the disposal of

hazardous wastes. The wastes showed hazardous waste levels for cadmium, DDT, DDD, and DDE in piles adjacent to the railroad tracks in the southwestern part of the Site.

(c) **Failure to Have an EPA Identification Number**

Respondent Dune violated California Code of Regulations, title 22, section 66262.12(a), in that on or about March 6, 2002, Respondent Dune failed to have an EPA identification number prior to storing and disposing of hazardous waste.

8. By entering into this Stipulation and Consent Order, Respondents Dune and Simplot neither admit nor deny the violations and underlying facts as alleged above in section 7, subsections (a) through (c).

9. A dispute exists between Respondent Dune and the Department regarding the alleged violations numbered 2, 3, 4, and 5, as set forth and further described in the Department's Inspection Report dated May 9, 2002. Those alleged violations relate to the underlying issue of whether Respondent Dune's fertilizer rinsewaters, generated from the rinsing of tanks containing residual liquid fertilizers, constitute a fertilizer "product" or "hazardous wastes" as defined by the Hazardous Waste Control Law, Health and Safety Code sections 25100 et seq. and related California Code of Regulations, title 22, section 66260.1 et seq. In order to resolve and settle this dispute, Respondent Dune acknowledges that the Department reserves the right as authorized by law to enforce the statutory and regulatory violations numbered 2, 3, 4, and 5, as set forth and described in the Department's Inspection Report dated May 9, 2002. Respondent Dune also agrees that all fertilizer rinsewaters generated by Respondent Dune shall be stored in closed tanks to prevent evaporation and/or other releases into the environment and that said fertilizer rinsewaters shall only be used and managed in a manner authorized by law.

10. Respondents shall comply with the following orders of correction:
With respect to violation 7 (a), Respondent Dune shall remove all hazardous wastes and follow all applicable generator requirements, including disposal to an approved facility. Respondent Dune shall also determine which wastes generated by the facility are classified as a hazardous waste pursuant to California Code of Regulations, title 22, section 66262.11. If Respondent

Dune determines that a waste is hazardous, the waste shall be managed as required by applicable

statutes and regulations. Within thirty (30) days from the effective date of this Consent Order, Respondent Dune shall prepare and provide to the Department a written plan which describes the manner in which Respondent Dune will manage spills or releases of hazardous materials, including but not limited to, fertilizer materials and products, that occur at any of Respondent Dune's facilities. The plan shall specify the steps that Respondent Dune will take to ensure compliance with all applicable hazardous waste laws and regulations and shall distinguish between spills or releases of hazardous materials that are managed and recovered immediately, and spills or releases of hazardous materials that are not recovered immediately and which are determined to be hazardous wastes under state or federal law.

In addition, Respondent Dune shall conduct appropriate sampling procedures to properly characterize and determine the horizontal and vertical extent of any hazardous waste contamination that may exist at or near (1) the ground along the railroad tracks, adjacent to the T-reactor area, where the discharge of "super concentrated phosphoric acid" occurred and (2) the "acid load-out rack" area where fertilizer having a pH of less than 2 was discharged.

With respect to violation 7 (b), Respondents Simplot and Dune shall immediately remove the hazardous wastes from the piles and shall continue to cover the pile with a tarp until all hazardous wastes are removed. The hazardous wastes shall be removed from the pile, following all generator requirements, including disposal to an approved facility.

With respect to violation 7 (c), the Department hereby acknowledges that subsequent to the March 6, 2002 inspection, Respondent Dune obtained an EPA identification number. Therefore, this violation has been corrected.

11. In order to achieve and confirm compliance with the above-referenced violations, the Respondents shall submit status reports, plans, schedules, provide split samples, or other documentation in the manner and time period required by the Department. Respondents shall notify the Department in writing at least seven (7) business days prior to the implementation of any removal work required to be performed pursuant to this Consent Order. All submittals from Respondents pursuant to this Consent Order shall be sent simultaneously to:

Nennet V. Alvarez, Branch Chief

Southern California Branch
Statewide Compliance Division
Department of Toxic Substances Control
5796 Corporate Avenue
Cypress, CA 90630-4732

and

Juan M. Jimenez, Chief
San Diego Border Unit
Southern California Branch
Statewide Compliance Division
Department of Toxic Substances Control
2878 Camino Del Rio South, Suite 420
San Diego, California

Respondent Dune or Respondent Simplot may obtain direct oversight approval from the Department for any site characterization and/or removal work required to be performed pursuant to this Consent Order. Respondents Dune and Simplot acknowledge and hereby agree to pay the Department's reasonable costs associated with any oversight work provided by the Department.

If Respondents Dune and/or Simplot seek to obtain direct oversight approval from the Department, Respondents will contact the Branch Chief of Tiered Permitting and Corrective Action Branch immediately after this Stipulation and Order is fully executed.

All approvals and decisions of the Department made regarding such submittals and notifications shall be communicated to Respondents in writing by a Branch Chief of the Department, or his/her designee. No informal advice, guidance, suggestions, or comments by the Department regarding reports, plans, specifications, schedules, or any other writings by Respondents shall be construed to relieve Respondents of their obligation to obtain such formal approvals as may be required.

12. If the Department determines that any report, plan, schedule, or other document submitted for approval pursuant to this Consent Order fails to comply with the Consent Order or fails to protect public health or safety or the environment, the Department may return the document to Respondents with recommended changes and a date by which Respondents must submit to the Department a revised document incorporating the recommended changes.

13. Respondents shall carry out this Consent Order in compliance with all local, State,

and federal requirements, including but not limited to requirements to obtain permits and to assure worker safety.

14. In the event that the Department determines that any circumstances or activity (whether or not pursued in compliance with this Consent Order) are creating an imminent or substantial endangerment to the health or welfare of people on the Site or in the surrounding area or to the environment, the Department may order Respondents to stop further implementation for such period of time as needed to abate the endangerment. Any deadline in this Consent Order directly affected by a Stop Work Order under this section shall be extended for the term of such Stop Work Order.

15. Access to the Site shall be provided at all reasonable times to employees, contractors, and consultants of the Department, and any agency having jurisdiction. Nothing in this Consent Order is intended to limit in any way the right of entry or inspection that any agency may otherwise have by operation of any law. The Department and its authorized representatives may enter and move freely about all property at the Site at all reasonable times for purposes including but not limited to: inspecting records, operating logs, and contracts relating to the Site; reviewing the progress of Respondents in carrying out the terms of this Consent Order; and conducting such tests as the Department may deem necessary. Respondents shall permit such persons to inspect and copy all non-privileged records, documents, and other writings, including all sampling and monitoring data, in any way pertaining to work undertaken pursuant to this Consent Order.

16. Respondents shall permit the Department and its authorized representatives to inspect and copy all sampling, testing, monitoring, and other data generated by Respondents or on Respondents' behalf in any way pertaining to work undertaken pursuant to this Consent Order. Respondents shall allow the Department and its authorized representatives to take split samples of any samples collected by Respondents pursuant to this Consent Order. Respondents shall maintain a central depository of the data, reports, and other documents prepared pursuant to this Consent Order. All such data, reports, and other documents shall be preserved by Respondents for a minimum of six years after the conclusion of all activities under this Consent Order. If the Department requests that some or all of these documents be preserved for a longer

period of time, Respondents shall either comply with that request, deliver the documents to the Department, or permit the Department to copy the documents prior to destruction. Respondents shall notify the Department in writing at least six months prior to destroying any documents prepared pursuant to this Consent Order.

17. All plans, schedules, and reports that require Department approval and are submitted by Respondents pursuant to this Consent Order are incorporated in this Consent Order upon approval by the Department.

18. If Respondents are unable to perform any activity or submit any document within the time required under this Consent Order, the Respondents may, prior to expiration of the time, request an extension of time in writing. The extension request shall include a justification for the delay. If the Department determines that good cause exists for an extension, it will grant the request and specify in writing a new compliance schedule.

19. Nothing in this Stipulation and Consent Order shall constitute or be construed as a satisfaction or release from liability for any conditions or claims arising as a result of past, current, or future operations of Respondents, except as provided herein. Notwithstanding compliance with the terms of this Consent Order, Respondents may be required to take further actions as are necessary to protect public health or welfare or the environment.

20. The State of California shall not be liable for injuries or damages to persons or property resulting from any prior or future acts or omissions by Respondents or related parties, as specified herein in carrying out the removal and correction activities required by this Stipulation and Consent Order.

21. Within 30 days from the effective date of this Consent Order, Respondent Dune shall pay the Department the sum of \$20,000 as a civil penalty assessment. In addition, Respondent Dune and Respondent Simplot shall pay the Department the sum of \$15,000 as an additional civil penalty assessment. If Respondents fail to make payment as provided herein, Respondents agree to pay interest at the rate established pursuant to Health and Safety Code section 25360.1 and to pay all costs incurred by the Department in pursuing collection, including attorney's fees. Respondents further acknowledge and agree that if Respondents fail to make

payment as provided herein, the Department may apply and obtain further judicial relief to collect the administrative penalty as set forth in Health and Safety Code section 25184.1. Failure to comply with the terms of this Order may subject Respondents to civil penalties and/or other damages for any costs incurred by the Department or other government agencies as a result of such failure, as provided by Health and Safety Code section 25188 and other applicable provisions of law.

Respondents' check shall identify the case matter number "HWCA 2002-0050" and be made payable to the Department of Toxic Substances Control, and shall be delivered to:

Department of Toxic Substances Control
Accounting Office
1001 I Street
P. O. Box 806
Sacramento, California 95812-0806

A photocopy of the check shall also be sent to:

Nennet V. Alvarez, Branch Chief
Southern California Branch
Statewide Compliance Division
Department of Toxic Substances Control
5796 Corporate Avenue
Cypress, CA 90630-4732

and

Juan M. Jimenez, Chief
San Diego Border Unit
Southern California Branch
Statewide Compliance Division
Department of Toxic Substances Control
2878 Camino Del Rio South, Suite 420
San Diego, California

22. This Stipulation and Consent Order shall apply to and be binding upon Respondent Dune and Respondent Simplot, their officers, directors, agents, receivers, trustees, employees, contractors, consultants, successors, and assignees, including but not limited to individuals, partners, and subsidiary and parent corporations, and upon the Department and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Consent Order.

23. The effective date of this Consent Order is the date it is signed by the Department's representative.

24. This Stipulation and Order constitutes the entire agreement between the parties and may not be amended, supplemented, or modified, except as provided in this agreement.

IT IS SO AGREED:

Dated: 01/12/2004

Original signed by Harry Balley, Corporate Secretary
The Dune Company
Respondent

Original signed by Harry Balley, Corporate Secretary
Typed or Printed Name and Title of

Dated: 01/19/2004

Original signed by Terri Uhling,
Senior Vice President, Secretary and General Counsel
J.R. Simplot Company
Respondent

Terri Uhling, Senior Vice President, Secretary and
General Counsel
Typed or Printed Name and Title of
Respondent's Representative

IT IS SO AGREED AND ORDERED:

Dated: 03/03/2004

Original signed by Nennet V. Alvarez, Branch Chief
Nennet V. Alvarez, Branch Chief
Statewide Compliance Division
Department of Toxic Substances Control

APPROVED AS TO FORM:

Dated: 02/18/2004

BILL LOCKYER, Attorney General
of the State of California
Richard M. Frank, Chief Assistant Attorney General
Theodora Berger, Assistant Attorney General
Timothy R. Patterson, Supervising Deputy Attorney General

By: Original signed by Edward H. Ochoa
Edward H. Ochoa
Deputy Attorney General
Attorneys for California Department of
Toxic Substances Control

Dated: 01/14/2004

By: Original signed by April V. Pearson, Esq.
April V. Pearson, Esq.
Attorney for The Dune Company

Dated: 01/09/2004

By: Original signed by Sheila Bush, Esq.
Sheila Bush, Esq.
Attorney for J.R. Simplot Company